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### Article 31: Disclosure Available To Obtain Material in Opposition to Motion Attacking Personal Jurisdiction

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determining what attorney's fees an insured is entitled to when his indemnitor leaves him. "Leaving him," the court implied, occurs when the insurer, upon notice of suit, fails to defend its client within a reasonable time thereafter. In such a situation, the insurer will be liable for all reasonable attorney's fees in relation to suits actively pending against its insured.

#### ARTICLE 31 — DISCLOSURE

*Article 31: Disclosure available to obtain material in opposition to motion attacking personal jurisdiction.*

In *Cronin v. New England Storage Warehouse Co.*,<sup>74</sup> the plaintiff sought damages for breach of contract. In his answer the defendant alleged, *inter alia*, that the court had no personal jurisdiction; and in a letter to the plaintiff the defendant made it known that he was going to move for a dismissal on that ground. The plaintiff then served written interrogatories upon the defendant concerning the question of jurisdiction; and the defendant moved for a protective order striking the interrogatories.<sup>75</sup> The defendant on the basis of pre-CPLR cases<sup>76</sup> claimed that disclosure was not available to obtain material to oppose a motion attacking the court's jurisdiction. The court held that under the CPLR the remedy of disclosure is definitely available on a motion attacking jurisdiction of defendant's person, and is available in the case even though the jurisdictional motion is not yet pending.

CPLR 3211(d) provides that if it appears, from affidavits submitted in opposition to a motion made under CPLR 3211(a)<sup>77</sup> or (b), that there are facts essential to justify the opposition, "the court may . . . order a discontinuance to permit . . . disclosure to be had. . . ." The decision in *Cronin* seems to fall within the design of CPLR 3211(d)<sup>78</sup> and the disclosure provisions of article 31. Much time and expense may be saved if the merit or lack of merit of defendant's motion can be established prior to the hearing of the motion.

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<sup>74</sup> 54 Misc. 2d 1088, 284 N.Y.S.2d 59 (Sup. Ct. Richmond County 1967).

<sup>75</sup> CPLR 3103 provides for the issuance by the court of protective orders regulating the use of disclosure in order to prevent prejudice to any of the parties.

<sup>76</sup> *Norton v. Cromwell*, 248 App. Div. 107, 290 N.Y.S. 707 (1st Dep't 1936); *In re Erlanger*, 231 App. Div. 70, 246 N.Y.S. 745 (1st Dep't 1930); *Debrey v. Hanna*, 182 Misc. 824, 45 N.Y.S.2d 551 (Sup. Ct. N.Y. County 1943).

<sup>77</sup> CPLR 3211(a)(8) allows a person to move for a dismissal on the ground of lack of personal jurisdiction.

<sup>78</sup> "The clear intent of the rules is to permit disclosure to elicit pertinent evidence concerning proof of issues involving jurisdictional questions." 54 Misc. 2d at 1088-89, 284 N.Y.S.2d at 60.